

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 304 of the)	
Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation)	
Devices)	PP Docket No. 00-67
)	
Compatibility Between Cable Systems)	
and Consumer Electronics Equipment)	
)	

REPLY COMMENTS OF TIVO INC.

October 25, 2013

SUMMARY

TiVo's Petition for Rulemaking seeks the reinstatement of rules that have been in place for the decade prior to the D.C. Circuit's decision earlier this year in *EchoStar Satellite L.L.C. v. FCC*. *EchoStar* did not address the merits of the FCC's judgment as to the need or policy rationale for the rules adopted in the *Second Report & Order*; it simply invalidated on jurisdictional grounds the encoding rules as they applied to Direct Broadcast Satellite providers. *EchoStar* did not provide a reason to reconsider the policy rationale behind the Commission's rules implementing Section 629, including specifically the CableCARD and encoding rules adopted in the *Second R&O* that TiVo seeks reinstated with respect to non-DBS MVPDs.

Since adopting the requirement that cable operators provide separable security modules, or PODs, in 1998, and the specific CableCARD standard in 2003, the Commission has reaffirmed the need for CableCARD rules, including as recently as in the *Third Report & Order* three years ago. CableCARD rules remain necessary today for the same reason they have been for the past decade — CableCARD is a standard that allows set-top box manufacturers to build retail products knowing that the products will get access to cable content, as envisioned by Section 629. There can be no retail market for set-top boxes if there is uncertainty among consumers that the device they purchase at retail will be supported by all cable operators everywhere in the entire country.

While the market for video programming continues to evolve, there have been no significant changes in the structure of the market for MVPD-delivered video programming in the last three years that should cause the Commission to reverse course on its policies implementing Section 629. While OVDs provide consumers with more options, there is still no substitute for the full range of content offered by MVPDs. Similarly, while some cable content in some areas can be accessed on devices such as an Xbox or Roku, this is not the sort of competition envisioned by Section 629 which aimed to give consumers choices with respect to how they viewed all cable content.

TiVo continues to support the need for a successor standard to CableCARD, and remains ready and willing to work with the cable industry and other interested parties to develop such a solution. However, until such a successor solution is in place, it is vital that the Commission confirm its continued support for the one existing standard that enables competition in the set-top box market.

To assure that there is a market for retail set-top boxes, it is critically important that the Commission act expeditiously to provide greater certainty to consumers, manufacturers, and MVPDs regarding the continued applicability of the CableCARD and encoding rules that have been in place for a decade and that consumers and manufacturers of retail devices have come to rely on.

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REPLY COMMENTS OF TIVO INC.

TiVo Inc. ("TiVo") hereby replies to the comments filed in response to its Petition for Rulemaking ("TiVo Petition") filed on July 16, 2013.¹ In aggregate, the comments filed opposing the TiVo Petition make no new arguments against the rules adopted in the Second Report & Order ("*Second R&O*")² that TiVo seeks reinstated. Indeed, the cable industry states that it plans to continue to comply with the rules adopted in the *Second R&O* that TiVo seeks reinstated,³ raising the

¹ Petition for Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (filed July 16, 2013); *Media Bureau Seeks Comment on TiVo Petition for Rulemaking To Reinstate the Commission's Second Report and Order Implementing Section 629 of the Act and Associated Rules*, Public Notice, CS Docket No. 97-80, PP Docket No. 00-67, DA 13-1626 (rel. July 24, 2013).

² *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-225 (rel. Oct. 9, 2003) ("*Second R&O*").

³ Comments of the National Cable & Telecommunications Assoc. at 11, 15-16 (Sep. 16, 2013) ("*NCTA Comments*").

question of why it nevertheless opposes TiVo's petition. The comments filed in opposition to the TiVo Petition also fail to suggest that the Commission does not have the jurisdiction to reinstate the rules adopted in the *Second R&O* — rules that have been in place for a decade and that the Commission has restated its support for several times since their enactment.

As TiVo noted in its Petition, the D.C. Circuit's decision in *EchoStar*⁴ has created uncertainty regarding the continued effectiveness of the Commission's policies under Section 629 that support a competitive retail market for navigation devices. The Commission should remove the uncertainty by initiating a rulemaking proceeding seeking to reinstate the rules adopted in the *Second R&O* as they apply to non-DBS MVPDs — rules that have existed since 2003 and that have been relied upon by cable operators, content providers, device manufacturers, and consumers.

I. INTRODUCTION AND SUMMARY

The comments filed in response to the TiVo Petition were split almost evenly between those in support and those in opposition.⁵ The parties opposing the TiVo Petition present no new substantive arguments, and merely raise issues concerning the continued need for CableCARD rules — concerns that were

⁴ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992 (D.C. Cir. 2013).

⁵ Supporting comments were filed by Consumer Electronics Association ("CEA"), The AllVid Tech Company Alliance ("AllVid Alliance"), and Public Knowledge, while opposing comments were filed by NCTA, Verizon, and The American Cable Association ("ACA"). In addition, Program Network Interests filed a letter opposing the TiVo Petition.

addressed and rejected most recently in the *Third R&O* in 2010 — or the continued need for encoding rules, which have been in place for a decade without controversy.

TiVo's Petition for Rulemaking merely seeks the reinstatement of rules that have been in place for the decade prior to the D.C. Circuit's decision in *EchoStar*. *EchoStar* did not address the merits of the FCC's judgment as to the need or policy rationale for the rules adopted in the *Second R&O*; it simply invalidated on jurisdictional grounds the encoding rules as they applied to Direct Broadcast Satellite providers.⁶ Indeed, *EchoStar* did not conclude that the Commission lacked any plausible statutory jurisdiction to enact the rules in question; it simply questioned the Commission's stated rationales for adopting the encoding rules as they apply to DBS providers.⁷

Thus, *EchoStar* did not provide a reason to reconsider the policy rationale behind the Commission's rules implementing Section 629, including specifically the CableCARD and encoding rules adopted in the *Second R&O*. Since adopting the requirement that cable operators provide separable security modules, or PODs, in the *First R&O* in 1998,⁸ and the specific CableCARD standard in the *Second R&O* in 2003, the Commission has reaffirmed the need for CableCARD

⁶ *EchoStar*, 704 F.3d at 1000.

⁷ *EchoStar*, 704 F.3d at 996-1000.

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, FCC 98-116 (rel. June 24, 1998) ("First R&O").

rules, including as recently as in the *Third R&O* three years ago.⁹ While the market for video programming continues to evolve, there have been no significant changes in the structure of the market for MVPD-delivered video programming in the last three years that should cause the Commission to reverse course on its policies implementing Section 629. As explained below, CableCARD rules remain a vital piece of the Commission's implementation of Section 629's requirement to enable retail competition in navigation devices. Similarly, the Commission's encoding rules have been in place for more than a decade and continue to play a critical role in ensuring that consumers' expectations regarding their retail devices are met — that the devices will work as expected and that consumers will be able to watch video programming to which they have subscribed without obstructions or unreasonable restrictions. TiVo's Petition thus merely asks the Commission to issue a Notice of Proposed Rulemaking confirming its continued support for its longstanding policies in this proceeding and, in light of *EchoStar*, asserting and seeking comment on the jurisdictional basis for reinstating the rules adopted in the *Second R&O* as they apply to non-DBS MVPDs.

As it has said in the past, TiVo continues to support the need for a successor standard to CableCARD, and remains ready and willing to work with the cable industry and other interested parties to develop such a solution.

⁹ *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, PP Docket No. 00-67, Third Report and Order and Order on Reconsideration, FCC 10-181 (rel. Oct. 14, 2010) ("Third R&O").

However, until such a successor solution is in place, it is vital that the Commission confirm its continued support for the one existing standard that enables competition in the set-top box market.

II. THE CABLECARD RULES ADOPTED IN THE SECOND R&O REMAIN NECESSARY AND SHOULD BE REINSTATED

A. CableCARD Is The Only Existing Standard That Facilitates a Retail Market for STBs, Thereby Promoting the Goals of Section 629

In light of comments opposing the TiVo Petition that question the need for CableCARD rules¹⁰ and even the integration ban adopted in the *First R&O*,¹¹ it is important to remember what this proceeding is about. As discussed in detail in the TiVo Petition,¹² the *First R&O* in this proceeding, which remains in place today, established a requirement for non-DBS MVPDs to provide customers with standard interface, separable security modules initially called “Point of Deployment” modules, or PODs, and later renamed CableCARDS by CableLabs. The *First R&O* also established the integration ban, requiring that MSOs rely on PODs in their own leased devices. These requirements were unaffected by *EchoStar* and remain in place today after being affirmed by courts following several challenges on jurisdictional grounds.¹³ Five years later, in 2003, the

¹⁰ NCTA Comments at 5-11; Verizon Comments at 3-5.

¹¹ ACA Comments at 3-6.

¹² TiVo Petition at 3-10.

¹³ The integration ban remains in place after being challenged unsuccessfully on three occasions. See, *Gen. Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter*

Commission released the *Second R&O*, which included rules referencing a specific technical, nationally interoperable standard for CableCARD — a standard that parties have relied on for over a decade. The D.C. Circuit’s decision in *EchoStar* vacated all rules adopted as part of the *Second R&O* — including the CableCARD standard, even though the Court’s analysis did not touch on this aspect of the *R&O*.¹⁴ TiVo’s Petition for Rulemaking simply asked that the specific CableCARD standard that was adopted in the *Second R&O* — and that was not challenged or at issue in *EchoStar* — be reinstated to remove uncertainty in the industry regarding the continued viability of conditional access standards, and did not seek to relitigate Commission policies that have been in place for over a decade.

The CableCARD rule vacated by *EchoStar* is necessary today for the same reason it has been for the past decade — it is a standard that allows set-top box manufacturers to build retail products knowing that the products will get access to cable content, as envisioned by Section 629. As the *EchoStar* court noted, achieving the mandate of Section 629 — which requires the Commission to adopt regulations to assure the competitive availability of navigation devices from independent manufacturers, retailers, and other vendors — “demands technical standardization among MVPDs so that navigation devices can be marketed

Commc’ns v. FCC, 440 F.3d 31 (D.C. Cir. 2006); *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008).

¹⁴ *EchoStar*, 704 F.3d at 1000.

nationally”¹⁵ There can be no retail market for set-top boxes if there is uncertainty among consumers that the devices they purchase at retail will be supported by all cable operators everywhere in the entire country. The CableCARD technical standard adopted as part of the *Second R&O* provides that certainty.

As TiVo explained in its Petition, the CableCARD standard benefits not only retail device manufacturers, but also small and mid-sized cable operators by allowing them to buy set-top boxes from multiple vendors and to avoid being locked in to a single conditional access system. Smaller operators do not have the same economies of scale as larger operators and so are typically not able to make the use of proprietary conditional access systems cost-effective.¹⁶

B. The Cable Industry’s Arguments Opposing Reinstatement of the *Second R&O*’s CableCARD Standard Lack Merit

NCTA opposes TiVo’s request to reinstate the CableCARD standard adopted in the *Second R&O*, describing the rule that was adopted in 2003 as a “new rule” and claiming that CableCARD rules are unnecessary. TiVo disagrees, and addresses NCTA’s arguments below.

First, NCTA argues that consumers have a greater number of choices both with respect to sources of video programming, thanks to the growth of OVDs,

¹⁵ *EchoStar*, 704 F.3d at 995.

¹⁶ TiVo Petition at 22-23.

and with respect to the devices on which they view programming.¹⁷ With respect to sources of video programming, while OVDs provide consumers with more options, there is still no substitute for the full range of content offered by MVPDs. Indeed, OVDs see themselves as complements to, rather than replacements for, MVPD services.¹⁸ Netflix, for example, views itself as competing with cable networks such as HBO, as evidenced by the former's increasing focus on original programming, rather than with MVPDs.¹⁹ Indeed, recent reports suggest that Netflix is negotiating with cable operators to integrate its service into cable-supplied set-top boxes.²⁰ Regardless of whether such an arrangement materializes, these negotiations are further proof that prominent OVDs like Netflix are not viable competitors to MVPDs and are not viewed as alternatives by consumers.

With respect to the devices on which consumers watch video programming, the fact that some MVPDs and cable networks allow subscribers to access a subset of cable content online on certain retail devices in limited

¹⁷ NCTA Comments at 5-9.

¹⁸ See Comments of Netflix, Inc., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 12-203, at 6-7 (Sep. 10, 2012) (discussing Netflix's similarities to cable channels like HBO, and that it is a complement to rather than a replacement for MVPD subscriptions).

¹⁹ *Id.* at 5-6; see also *Netflix: Subscribers Up, Original Content to Double*, Oct. 21, 2013, at <http://www.nbcnews.com/business/netflix-subscribers-original-content-investment-double-8C11434084>.

²⁰ See Alistair Barr & Brett Molina, *Netflix in Talks to Get its Service on Cable TV Boxes*, Oct. 14, 2013, at <http://www.usatoday.com/story/tech/2013/10/14/netflix-cable-boxes/2978901/>; Catherine Shu, *Netflix Reportedly in Negotiations With U.S. Cable TV Providers*, Oct. 13, 2013, at <http://techcrunch.com/2013/10/13/netflix-reportedly-in-negotiations-with-u-s-cable-tv-providers/>.

geographies is a positive development for consumers but is not the sort of competition envisioned by Section 629. To begin with, devices such as an Xbox or Roku (or similar devices) are not substitutes for cable set-top boxes — they are not purchased principally to watch cable content but rather to play games or watch OTT content from OVDs such as Netflix. If consumers using these devices were able to get some content from some operators in some markets, it would be an added benefit. Consumers, however, cannot rely on being able to access all cable content in all locations, which means that these devices cannot be marketed to consumers as cable box substitutes. These devices also lack the ability to record cable content and hence cannot be viewed as substitutes for cable operator-supplied DVRs. Most importantly, these devices merely display cable “apps”; they cannot create user interfaces to present the cable content in more innovative and interesting ways than the cable operator dictates in its app. The user experience is what differentiates consumer electronics products and is the reason that a consumer would purchase a device that provides a better experience than the experience the consumer can get with an operator-supplied box. In short, devices such as the Xbox and Roku are not a competitive alternative to the operator-supplied device and, therefore, do not satisfy the requirements of Section 629.

TiVo’s devices, on the other hand, are examples of the type of retail competition envisioned by Section 629. TiVo’s newest offering, the TiVo Roamio line of DVRs, has been hailed as the “holy grail” of set-top boxes, with features

such as streaming to mobile devices such as tablets and mobile phones, the ability to record up to six programs at once, advanced search and discovery capabilities, and the ability to access TV, movies, music, and more from a variety of MVPD and online sources, all from a single menu in an award-winning user interface.²¹ TiVo users' satisfaction and positive reviews are in stark contrast with the typical cable-supplied equipment.²²

²¹ See Walter S. Mossberg, *New Roamio: TiVo On The Go*, Aug. 20, 2013, at <http://online.wsj.com/news/articles/SB10001424127887324108204579024853407128012> ("While streaming is the big news here, it's worth pointing out that, even without it, the TiVo could be considered the holy grail of set-top boxes. That's because it combines the functions of a cable box, a DVR and a device for receiving Internet-video services like Netflix, Amazon, Hulu Plus and YouTube.").

²² TiVo's new Roamio line of DVRs has received consistently excellent reviews. See, e.g., Nilay Patel, *TiVo Roamio Review: This is the Ultimate Cable Box*, *The Verge*, Aug. 20, 2013, at <http://www.theverge.com/2013/8/20/4638390/tivo-roamio-pro-review> ("The TiVo Roamio Pro is very much the ultimate DVR . . . there isn't another product on the market that can do as much with as much flexibility as the Roamio."); Josh Goldman, *TiVo's Latest DVR Goes Whole Home and Mobile*, Aug. 20, 2013, at http://cnettv.cnet.com/tivo-latest-dvr-goes-whole-home-mobile/9742-1_53-50153282.html ("For those fed up with their cable provider's DVR, the Roamio is a convincing argument for dumping them once and for all."); *TiVo Roamio Pro Review: TV and Online Video Nirvana in One Box*, Sep. 13, 2013, at http://reviews.cnet.com/digital-video-recorders-dvrs/tivo-roamio-pro/4505-6474_7-35826606.html ("[T]he Roamio is a one-box solution offering a superior user experience and more features than any other cable DVR."); Ben Drawbaugh, *TiVo Roamio Pro Review*, Aug. 20, 2013, at <http://www.engadget.com/2013/08/20/tivo-roamio-plus-review/> ("Is it the best DVR ever released that works with ATSC and/or CableCARD? Absolutely."); Jason Snell, *TiVo Roamio Review: A Pretty Good DVR With a Silly Name*, Aug. 26, 2013, at <http://www.techhive.com/article/2047346/tivo-roamio-review-a-pretty-good-dvr-with-a-silly-name.html> ("[T]he TiVo interface seems much more attractive and thoughtful than the bog-standard cable boxes out there. . . . [I]f you're a digital cable subscriber who wants a better interface, the ability to stream and download shows to iOS devices, and single-box access to numerous online streaming services, TiVo Roamio offers a premium TV viewing experience."); Christina Warren, *TiVo Roamio Reinvents the Cable Box for the Digital Streaming Age*, Aug. 27, 2013, at <http://mashable.com/2013/08/27/tivo-roamio-plus-review/> ("[H]ands-down the best all-in-one solution for cable subscribers who also love digital content. . . . I've spent the last two weeks using a TiVo for the first time in years and I genuinely do not want to go

NCTA also argues that reinstating the CableCARD standard is unnecessary because cable operators continue to support CableCARD, and that there is “no evidence” that cable operators will pull back their CableCARD support.²³ As an initial matter, one has to wonder why NCTA is opposed to the reinstatement of the CableCARD standard if cable operators plan to comply with the rule by continuing to provide CableCARDs. Moreover, while TiVo is heartened to hear that cable operators plan to continue to provide and support CableCARD, such assurances do not rise anywhere near the level of certainty required for a retail market to exist.²⁴ Manufacturers need to have a high level of confidence that the standard around which they build their products will continue to be supported, and consumers need to know that the product they are buying will work with their respective cable operators. Non-binding promises are not enough.

Moreover, TiVo’s internal surveys of MVPD compliance with CableCARD support requirements show that compliance is down following *EchoStar*. These surveys show a drop in the percentage of MSOs offering discounts off their

back to the cable box DVR.”); Mari Sibley, *New TiVo DVRs Top Cable Efforts*, Aug. 21, 2013, at http://www.lightreading.com/document.asp?doc_id=705313 (“the high end of the product line puts cable’s notion of TV Everywhere to shame. . . . Current cable DVRs can’t compete with the new TiVo boxes . . .”). Cable operator-provided set-top boxes, on the other hand, are rarely viewed the same way. See, e.g., John Patrick Pullen, *America’s Most Hated Device: The Cable Box*, Aug. 27, 2013, at <http://tech.fortune.cnn.com/2013/08/27/americas-most-hated-device-cable-box/>.

²³ NCTA Comments at 11-12.

²⁴ See AllVid Alliance Comments at 4 (noting that explicit references to technical standards have proven essential to commercial entry of retail devices).

bundled prices for customer-owned DVRs in apparent violation of 47 C.F.R. § 76.1205(b)(5)(ii)(B)(2), and more MSOs requiring provider-only installations of CableCARDs in apparent violation of 47 C.F.R. § 76.1205(b)(1). In addition, Verizon recently announced an increase in its already industry-high CableCARD fees to \$4.99/month, up between \$1 and \$2 — another barrier for Verizon subscribers who choose to use a competitive set-top box purchased at retail. Indeed, TiVo users' experiences with CableCARD support over the years demonstrate the challenges that consumers must overcome to purchase retail devices even with CableCARD rules in place, and were the basis for several additional CableCARD support requirements adopted in the *Third R&O*.²⁵ It would be a mistake, and an abdication of the Commission's mandate under Section 629, to weaken CableCARD requirements at this time, just as new CableCARD-reliant retail products are entering the market.²⁶

²⁵ Based in large part on the record of CableCARD support by MSOs to that point, the *Third R&O* adopted reforms to the CableCARD rules, including requirements for transparency and nondiscrimination in CableCARD pricing and billing; a requirement that MVPDs allow self-installation of CableCARDs for devices where the manufacturer provides instructions; a requirement that MVPD technicians arrive with at least the number of CableCARDs requested by the customer; a requirement to provide M-CARDs; and a requirement to support Switched Digital Video for retail devices. *Third R&O*, ¶¶ 9-33.

²⁶ In addition to TiVo's new Roamio line of DVRs, Samsung and Ceton Corp. have introduced new CableCARD products as noted in the Petition for Rulemaking. See TiVo Petition at 9 n.30. NCTA argues that the announcement of new retail products since *EchoStar* was decided is evidence that the lack of a CableCARD standard in the rules is not hurting retail competition. However, product timelines are typically long enough that the decisions to introduce these new retail products were likely made long before *EchoStar* was decided earlier this year. Indeed, it is far more likely that these product decisions were made in the aftermath of the Commission's strengthening of CableCARD support in the *Third R&O*. Moreover, the fact that some retail competition exists even

Finally, NCTA argues that CableCARD rules are not needed because the separable security requirement adopted in the *First R&O* serves as a “regulatory backstop.”²⁷ This argument, in effect, seeks reconsideration of a rule adopted a decade ago. It suggests that, having required MVPDs to provide separable security, the Commission should have stopped and not taken the necessary next step of implementing an industry-adopted standard for separable security PODs. NCTA’s argument ignores the central role of standards in enabling a retail market. A retail market can only flourish if there is a single national standard; as the *EchoStar* court noted, the Commission’s mandate under Section 629 to assure the availability of retail navigation devices “demands technical standardization among MVPDs so that navigation devices can be marketed nationally”²⁸ The Media Bureau has already foreshadowed the possibility that, post-*EchoStar*, MVPDs previously subject to the CableCARD rules would each be free to implement their own separable security conditional access solution.²⁹ Such a prospect would make it almost impossible for a retail market to exist, since it would be almost impossible for manufacturers to build devices that work with

after *EchoStar* says nothing about what the state of the retail market might be had *EchoStar* not vacated the rules adopted in the *Second R&O*.

²⁷ NCTA Comments at 12-13.

²⁸ *EchoStar*, 704 F.3d at 995.

²⁹ *Charter Communications, Inc.’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1) of the Commission’s Rules*, MB Docket No. 12-238, CSR-8740-Z, CS Docket No. 97-80, Memorandum Opinion and Order, DA 13-788, ¶ 9 (rel. Apr. 18, 2013) (“After the *EchoStar* decision, we recognize that there is the potential for a fractured cable set-top box market should different cable operators adopt differing non-CableCARD separated-security standards.”) Note that CEA and TiVo have sought review and reconsideration of the Media Bureau’s Order granting Charter’s waiver request.

all MVPDs, and consumers would have no assurance that a retail set-top box that they purchase would work with their particular cable provider.³⁰ The separable security requirement alone provides no “regulatory backstop” for retail manufacturers, which is why the Commission adopted the industry-developed CableCARD rule in the *Second R&O* to begin with.

III. TIVO CONTINUES TO SUPPORT A SUCCESSOR STANDARD TO REPLACE CABLECARD

TiVo made clear in its Petition that it is not urging use of CableCARDS in perpetuity. TiVo has long supported, and continues to support, a successor standard to CableCARD.³¹ Indeed, while CableCARD is indispensable for retail device manufacturers because it guarantees that such devices will have access to cable content, it is far from an ideal solution for independent manufacturers such as TiVo. As the Commission is well aware, CableCARDS used in retail devices are prohibited from using the upstream capabilities of the cable network, and thus do not enable retail devices to use two-way features such as video on

³⁰ See *First R&O* ¶ 70 (“What is important is for the [POD] supplied by the service provider to be designed to connect to and function with other navigation devices through the use of a *commonly* used interface or through an interface that conforms to appropriate technical standards promulgated by a *national* standards organization.”) (emphasis added); *id.* ¶49 (discussing the importance of a conditional access security solution that permits portability of equipment).

³¹ See Comments of TiVo Inc., CS Docket No. 97-80, PP Docket No. 00-67 (Aug. 24, 2007) (comments in response to Two-way FNPRM seeking comment on the development of a solution for bidirectional compatibility between cable systems and CE equipment) (“TiVo Two-Way Comments”); Comments of TiVo Inc., MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67 (July 13, 2010) (comments in response to “AllVid” NOI discussing characteristics needed for successor to CableCARD); Comments of TiVo Inc., MB Docket No. 07-269, at 13-15 (July 29, 2009) (discussing attributes of a potential successor conditional access solution).

demand (VOD) and impulse pay-per-view (PPV). The one-way retail CableCARD standard also does not allow retail devices to access Switched Digital Video (SDV) channels without using a tuning adapter — a functional but inelegant solution that serves as another barrier for retail devices seeking to deliver a consumer experience equivalent to that provided by leased devices. Such shortcomings are of course the reason the Commission has long sought to develop a successor solution to CableCARD that enables bidirectional features.³² For its part, TiVo has long supported alternative conditional access security solutions so long as they actually enable retail competition and do not cripple innovation by retail manufacturers.³³

NCTA and Verizon argue that the CableCARD standard stands in the way of a successor standard,³⁴ but in fact the opposite is true. Ensuring that the one viable standard that exists in the marketplace today remains in place gives all

³² *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Third Further Notice of Proposed Rulemaking, FCC 07-120 (rel. June 29, 2007) (seeking comment on proposed standards to ensure bidirectional compatibility between cable TV systems and CE equipment); *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67, Notice of Inquiry, FCC 10-60 (rel. Apr. 21, 2010) (seeking comment on a possible successor solution to CableCARD, an “AllVid” gateway); *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order and Further Notice of Proposed Rulemaking, FCC 03-89, ¶ 5 (rel. Apr. 25, 2003) (requiring cable and consumer electronics industries to provide updates on bidirectional compatibility negotiations).

³³ See TiVo Two-Way Comments at 11-17.

³⁴ NCTA Comments at 13; Verizon Comments at 4-5.

parties the incentives needed to work toward a successor solution. Conversely, allowing each cable operator to spend resources developing its own proprietary conditional access solution creates a fractured industry and moves the industry further away from a successor solution. As the Commission noted in the *Third R&O*, until a new solution that actually enables retail competition is available, the Commission should continue to ensure that the existing CableCARD standard works for consumers and retail manufacturers.³⁵

The Commission has already considered the need for and the path toward a successor solution to CableCARD, and has an existing Notice of Inquiry proceeding regarding a successor standard that can serve as a vehicle for progress in this area.³⁶ TiVo stands ready to work with all interested parties to help develop a successor solution.

³⁵ *Third R&O*, ¶ 8 (“[W]e must keep in mind that CableCARD is a realized technology – consumer electronics manufacturers can build to and are building to the standard today. Until a successor technology is actually available, the Commission must strive to make the existing CableCARD standard work”); cf. *id.*, ¶ 51 (“[O]pponents of ending the integration ban assert that it would discourage cable operators from negotiating in good faith in developing a successor technology to CableCARD, as cable operators would have no economic incentive to work to develop such a technology in a timely fashion. We agree. The integration ban continues to serve several important purposes – better support for CableCARD devices, economies of scale for CableCARDs, and economic incentives to develop better solutions. Ending the integration ban before a successor standard is developed would undermine the market for retail navigation devices.”).

³⁶ *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, CS Docket No. 97-80, PP Docket No. 00-67.

Finally, NCTA asks the Commission, if it were to reinstate the rules adopted in the *Second R&O*, to adopt a sunset of the CableCARD rules.³⁷ TiVo supports a sunset of the CableCARD rule – but ONLY if a successor solution is in place. As the Commission recognized in the *Third R&O*, CableCARD is the only realized solution available today that enables retail competition nationwide, and must be supported until a successor standard is available.³⁸ If the Commission were to sunset the CableCARD standard prior to a successor solution being in place, it will be failing to live up to its mandate under Section 629 to assure the competitive availability of retail navigation devices.

IV. THE ENCODING RULES REMAIN NECESSARY TO PROTECT CONSUMER VIEWING EXPECTATIONS AND SHOULD BE REINSTATED WITH RESPECT TO NON-DBS MVPDS

As discussed above with respect to the CableCARD rules adopted in the *Second R&O*, it is important to note that *EchoStar* did not question the underlying policy rationale for the encoding rules, only the Commission's jurisdiction for adopting such rules as they apply to DBS providers. Thus, the Commission need not reconsider the underlying policy rationale for rules that have been in place for a decade without controversy, and that have served to ensure a marketplace for consumer devices for viewing television programming.

Contrary to arguments by NCTA and others, the encoding rules adopted in the *Second R&O* remain necessary to ensure consumers are able to view

³⁷ NCTA Comments at 13.

³⁸ *Third R&O*, ¶ 8; see also Public Knowledge Comments at 2-3.

content without obstructions or unreasonable restrictions, and to ensure that retail navigation devices work as designed to allow features like recording, sideloading, and streaming. Without these rules in place, nothing would prevent programming interests, through retransmission consent negotiations, from imposing unreasonable restrictions on consumers' use of programming. Nor would there be any rules in place to prevent cable operators from treating leased and retail devices differently, raising the prospect of retail devices being at yet another disadvantage as they are today with differences in their ability to access bidirectional content such as VOD and SDV (without needing a tuning adapter).³⁹

Should the Commission decide not to reinstate the encoding rules for cable operators, it should make clear that the DFAST license must be amended to eliminate the requirement that retail set-top box manufacturers must abide by the Copy Control Information (CCI) bits. The encoding rules adopted in the *Second R&O* were part and parcel to the requirement that retail manufacturers signing DFAST have to abide by the CCI bits; if the encoding rules are not reinstated, then the terms of the bargain struck a decade ago balancing the relative interests of the various stakeholders would have changed and nothing would stop programming interests from unduly restricting the ability of

³⁹ AllVid Alliance Comments at 6, CEA Comments at 8.

consumers to make “fair use” of broadcast and cable content under applicable law.⁴⁰

V. THE COMMISSION SHOULD ADOPT A NOTICE OF PROPOSED RULEMAKING SEEKING TO REINSTATE THE RULES ADOPTED IN THE SECOND R&O

TiVo again emphasizes that its Petition concerned simply reinstating the rules adopted in the *Second R&O* as they apply to non-DBS MVPDs. The policy rationale behind the rules, which have been in place for a decade, were not at issue in *EchoStar*, and these rules have been in place after being the subject of Commission proceedings and consideration over the years. The TiVo Petition raises no new substantive policy issues, and does not seek any new substantive rule that has not already been in place for a decade. Thus, arguments regarding the underlying policy rationale of the rules adopted in the *Second R&O* need not and should not be considered by the FCC as part of this proceeding.

As its next step, the Commission should adopt expeditiously a Notice of Proposed Rulemaking that sets forth the Commission’s jurisdictional basis, in light of the *EchoStar* decision, for reinstating the rules adopted in the *Second R&O* as they apply to non-DBS MVPDs, and that seeks comment on such jurisdictional basis. TiVo agrees with Verizon in this regard.⁴¹

⁴⁰ Retail manufacturers and consumers would thus fall back on copyright law to determine the permissible uses of the content received via antenna or in conjunction with their cable subscription.

⁴¹ Verizon Comments at 7 (arguing that the Commission must seek comment on the jurisdictional basis for reinstating the rules vacated by *EchoStar*).

There should be little doubt that the Commission has the authority to adopt the CableCARD and encoding rules to cable operators and other similar MVPDs; indeed, the parties opposing the TiVo Petition focus almost entirely on substantive arguments questioning the need for CableCARD and encoding rules that were not raised during *EchoStar*'s consideration of the Commission's jurisdiction to adopt the encoding rules as they apply to DBS providers. The CableCARD rules are plainly authorized by Section 629's requirement that the Commission assure a market for retail navigation devices, and, as *EchoStar* clearly suggests, the encoding rules (as they pertain to non-DBS MVPDs) are also authorized under Section 629 to ensure consumer satisfaction in retail devices, thereby ensuring a viable commercial market.⁴²

Commenting parties raise a number of additional, substantive issues regarding the CableCARD and encoding rules. For example, NCTA argues that if the Commission reinstates the encoding rules, it should impose them on all MVPDs. TiVo has long been on record agreeing that retail devices should have access to the signals of all MVPDs.⁴³ Without the exemption for the then nascent

⁴² *EchoStar*, 704 F.3d at 997 (discussing the Commission's justification for the encoding rules and finding them lacking only with respect to DBS devices because the Commission had concluded that such rules were not needed to sustain a commercial market for DBS devices).

⁴³ See, e.g., TiVo Two-Way Comments at 27-28 ("TiVo welcomes the adoption of bidirectional compatibility standards for *all* MVPDs, as such standards would enable CE equipment to be easily designed to work with all MVPD platforms, further enabling economies of scale and promoting competition in the device market.") (emphasis added); TiVo Petition at 24 ("[A] successor solution that is bidirectional and that applies to *all* MVPDs is needed to truly create a level-playing field among all MVPDs and among MVPD-provided and retail navigation devices.") (emphasis added).

satellite industry from the CableCARD rules, the rationale for the *EchoStar* court's conclusion that the Commission lacked jurisdiction to adopt the encoding rules for DBS providers would no longer hold. In addition, ACA requests that small cable operators be exempt from the integration ban — which was not affected by *EchoStar*. Absent cases of demonstrable hardship where the Commission has not hesitated to grant relief, TiVo believes that all stakeholders should focus on a successor standard rather than waivers. To the extent the Commission decides to examine these issues that are beyond the scope of the TiVo Petition, they should be considered separately from the Commission's consideration of the jurisdictional basis for reinstating its longstanding CableCARD and encoding rules. To assure that there is a market for retail set-top boxes, it is critically important that the Commission act expeditiously to provide greater certainty to consumers, manufacturers, and MSOs regarding the continued applicability of the CableCARD and encoding rules that have been in place for a decade and that consumers and manufacturers of retail devices have come to rely on.

* * *

For the reasons discussed in the TiVo Petition and above, TiVo urges the Commission to act expeditiously to initiate a rulemaking proceeding seeking to reinstate the rules adopted in the *Second R&O* as they apply to non-DBS MVPDs.

Respectfully submitted,

_____/s/_____
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